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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 926

BETHLEHEM STEEL COMPANY and MARYLAND SHIPBUILDING & DRYDOCK COMPANY, *Petitioners,*

v.

UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Bethlehem Steel Company and Maryland Shipbuilding & Drydock Company petition for a writ of certiorari to review the judgment of the United States Court of Customs and Patent Appeals entered in this case on August 4, 1966.

OPINIONS BELOW

The opinion of the United States Customs Court (R. 114-127),[1] printed in Appendix A hereto, *infra,* pp. 1a-15a, is reported in 238 F. Supp. 483. The opinion of the Court of Customs and Patent Appeals, printed in Appendix B hereto, *infra,* pp. 16a-34a, is unreported.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on August 4, 1966. Rehearing was denied on October 6, 1966. A copy of the judgment of which review is sought is printed in Appendix C hereto, *infra,* p. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Petitioners brought to the United States, under tow, two ship "midbodies", each of which was built according to accepted standards for the construction of watercraft, was over 500 feet long, had a cargo capacity of over 12,000 tons, was manned by a crew of eight, carried all necessary navigational lights and marine insurance, and, upon arrival in this country, was suitable for use as a barge in the commercial transportation of cargo. The midbodies were intended for ultimate use as cargo sections of Great Lakes ore carriers.

The question presented is whether the Court of Customs and Patent Appeals correctly held that the midbodies were not vessels, and were therefore subject to customs duty, although the midbodies met all factual, statutory, and established judicial tests as to what constitutes a vessel.

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[1] Record references herein are to the Transcript of Record as printed for the use of the court below.

STATUTE INVOLVED

Title 1 U.S.C., § 3, Act of July 30, 1947, c. 388, § 1, 61 Stat. 633, derived from R.S., § 3, provides:

> "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[2]

STATEMENT

The midbodies[3] here in controversy were built in European shipyards and, in 1961, were brought to this country on their own bottoms under tow (R. 7, 13, 26, 102). Upon their arrival here, the Collector of Customs at Baltimore, Maryland, assessed duties with respect to the midbodies, as articles not specially provided for, manufactured in chief value of steel, at the rate of 19 per cent ad valorem (R. 9, 14). Petitioners filed protests (R. 7-8, 13), pursuant to section 514 of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, § 514, 46 Stat. 734, 19 U.S.C. 1514), on the ground, *inter alia,* that the midbodies are vessels and are therefore not subject to duty under the rule of *The Conqueror*, 166 U.S. 110. In accordance with section 515 of the Tariff Act of 1930 (Act of June 17,

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[2] An almost verbatim definition of "vessel" is contained in the administrative provisions of the Tariff Act of 1930. Act of June 17, 1930, c. 497, § 401(a), 46 Stat. 708, 19 U.S.C. 1401(a).

[3] A midbody is the mid-section of a freighter. Following the conclusion of World War II, there was a surplus of T-2 and T-3 tankers in the United States, and it was discovered that they could be more efficiently used if their mid-sections were enlarged. This was done by separating the bow and stern sections of the tanker from its center section and inserting a newly-built and larger mid-section or midbody. Some midbodies were built in the United States; others abroad. App. B, *infra*, p. 17a; R. 18-19.

1930, c. 497, § 515, 46 Stat. 734, 19 U.S.C. 1515), the protests, following affirmance by the Collector of his decisions (R. 9, 14), were transmitted to the Customs Court, where they were consolidated for trial (R. 18, 114).

At the trial the uncontroverted evidence[4] showed that the midbodies were built in accordance with conventional shipbuilding designs, plans, and specifications, prepared by naval architects, which conformed to the accepted standards for the construction of vessels and were approved by governing bodies such as the American Bureau of Shipping, the United States Coast Guard, and the United States Public Health Service (R. 26-27, 29-32, 43, 47-48, 101-102; App. A, *infra,* p. 3a; 238 F. Supp. at 484-85. They were brought to this country under tow (R. 42, 102).

Each of the midbodies was over 500 feet long (R. 26, 101), and had a cargo capacity of between 12,000 and 14,000 tons (R. 44-45, 47, 106). In order to facilitate their transatlantic voyages, each was equipped with a temporary bow and a strengthened stern (R. 26, 33-34, 40-41, 102, 108, 110). Each craft had crew quarters and carried a crew of eight men, each of whom had signed ship's articles for the crossing (R. 38, 41-42, 101-102). Each midbody was equipped with light, heat, food, life rafts, life preservers, anchor, and a generator for light, heat, and messing, and carried the navigational lights and signals required of vessels to comply with navigational rules of the road and

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[4] The evidence in the case was adduced exclusively by petitioners. None was adduced on behalf of the United States. Nor, as found by the court below (App. B, *infra,* p. 19a) did respondent challenge any of the petitioners' evidence.

to indicate that the craft was under tow (R. 38-39, 41, 101-102; App. A, *infra,* pp. 3a-4a; 238 F. Supp. at 485). In addition, each midbody carried marine insurance against damage to or loss of the craft in transit, and which also covered the crew of eight who manned the craft while crossing the ocean (R. 36; App. A, *infra,* p. 4a; 238 F. Supp, at 485). Although designed for ultimate use as cargo sections of self-propelled ore carriers on the Great Lakes, the mid-bodies were, upon their arrival in this country, suitable for use as vessels of the barge type for the commercial transportation of cargo[5] (R. 40, 45-47, 79-80, 82, 89-90, 98, 102-103, 106; App. A, *infra,* p. 3a; 238 F. Supp. at 485).

The Customs Court, after carefully reviewing the evidence and the judicial precedents as to the factors determining what constitutes a vessel (App. A, *infra,* pp. 3a-13a; R. 115-124; 238 F. Supp. at 484-89), held (App. A, *infra,* pp. 13a-15a; R. 125-26; 238 F. Supp. at 489-90):

> "Of course, the tariff status of the craft must be determined by their *utility* or *capability for use* at the time of their arrival in the United States.
>
> "At that time, they had been towed on their own bottoms several thousand miles across the Atlantic Ocean.
>
> "They were seaworthy.
>
> "They had been constructed in accordance with designs, plans, and specifications carefully drawn by skilled naval engineers and architects to meet the rigid and accepted standards of navigational requirements.

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[5] Indeed, the record clearly shows a number of instances where midbodies, of the same type as petitioners', have actually been used to carry cargo. R. 102-105.

"They were launched in European shipyards as other watercraft would be launched.

"They floated and were fully equipped for proper and safe navigation under tow to the United States.

"They were capable of transporting cargo if their owners elected to use them for that purpose.

"They had the physical appearance of certain watercraft commonly seen in the harbors of our port cities used as barges being towed.

"The mere fact that the midbodies were to become the midsections of ore carriers did not destroy their original character as watercraft *capable of being used* as a means of transportation in water.

* * * * *

"In our opinion, the evidence places the contested midbodies within the class of watercraft judicially recognized as 'vessels.'

* * * * * *

"It is the considered opinion of the court that the subject midbodies are 'vessels' within the statutory meaning of that term and, accordingly, should not be subject to customs duties."

On appeal, the Court of Customs and Patent Appeals adopted the Customs Court's statement of the evidence, and conceded that the following, which it quoted from the opinion of the Customs Court, "accurately summarizes the case law":

"It seems highly incongruous and unbelievable that Congress could have intended that scows, dredges, barges, elevators, log rafts, houseboats, and old hull converted into a wharf boat, and so many inferior craft should be classified as vessels (as held by the courts) and at the same time have intended that a staunch seagoing craft, possessing the requisite navigational qualifications possessed by these midbodies, should be relegated

to the unenumerated catchall provision * * * as articles of metal". (App. B, *infra,* p. 32a)

Nevertheless, the court below held that the midbodies were not vessels and accordingly "are not entitled to duty-free status" (App. B. *infra,* p. 34a), and reversed the judgment of the Customs Court. The gist of the opinion below appears to be that the mid-bodies, having been "designed and intended" for the purpose of becoming mid-sections of ore carriers, could not themselves be vessels.

REASONS FOR GRANTING THE WRIT

1. The midbodies fit perfectly both aspects of the definition of vessel prescribed by 1 U.S.C. 3, in that (1) they were being *used to transport* eight men across the Atlantic Ocean and had been so used in the crossing and (2) they were *capable of being used as a means of water transportation* for both cargo and crew. It was not for failure of the midbodies to meet the factual, statutory, or established judicial tests as to what constitutes a vessel that caused the court below to hold that they were not vessels. Rather, it was that the court below sought to add a new criterion, one that looked to the ultimate disposition of the midbodies. To the court below the critical factor was that the midbodies were "designed and intended" "to serve as midsections of ore carriers." (App. B, *infra,* pp. 33a-34a). Of course the long-range intention with respect to the midbodies was that they should become mid-sections of ore carriers, and they were designed with that in mind. But that does not deny that the midbodies had been designed first to cross the ocean; and that they did so. Also, they were intended to be, and were capable of being, used as means of transportation—they could

not have come to this country otherwise than by transporting themselves and their crews. That they were to serve another purpose after arrival in the United States is irrelevant.

This looking to the future, as the court below did, to determine whether something brought into this country is subject to customs duty is in direct conflict with the fundamental rule that the tariff status of an article is governed by its condition at the time of arrival in the United States. *United States* v. *Schoverling,* 146 U.S. 76; *Worthington* v. *Robbins,* 139 U.S. 337; *Leonard Levin Co.* v. *United States,* 27 C.C.P.A. 101, 105 C.A.D. 69; *The Altenburg,* 21 Treas. Dec. 275, T.D. 31898 (Bd. of Genl. Appraisers, 1911). Eliminating, as these cases teach, petitioners' intentions regarding the future, post-arrival disposition or use of the midbodies, they were vessels in every relevant factual sense and met the criteria of 1 U.S.C. 3 as the language of the statute plainly reads and as it has been construed and applied by this Court, by the United States Courts of Appeals, by the court below itself, and by other courts.

All the statute (1 U.S.C. 3) required of the midbodies, in order that they be regarded as vessels, was that they be "used, or capable of being used, as a means of transportation on water." This is the rule applied by this Court in *Norton* v. *Warner Co.,* 321 U.S. 565, holding that a non-self-propelled barge was a vessel "even when it has no motive power of its own, since it is a means of transportation on water." 321 U.S. at 571.

The decision below, in looking beyond this to petitioners' intended future use of the midbodies, is in conflict with *The International,* 89 Fed. 484 (C.A. 3). There, a Collector of Customs had levied duty on a

dredge and scows, but the owner, claiming that they were vessels and therefore not subject to duty, successfully libeled the craft. The court dismissed as immaterial the facts that the dredge *was not intended* to carry passengers and cargo, the scows could carry only mud, and none of the craft was self-propelled, and held with reference to R.S. § 3, the predecessor statute to 1 U.S.C. 3 (89 Fed. at 485):

> "The terms of this provision are broad and unqualified. The word 'transportation' is not expressly or impliedly limited to the carriage of passengers or merchandise for hire. A pleasure yacht or an ice boat is a vessel within the meaning of the section, equally with a merchantman or an ocean liner * * * While the dredge was not intended or adapted for the carriage of merchandise or passengers, and did not possess the power of self-propulsion except to an inadequate extent through the use of its steam shovel or dipper as a paddle, it was nevertheless a water craft 'used, or capable of being used, as a means of transportation on water.'"

The decision below likewise conflicts with the application of 1 U.S.C. 3 in *Pleason* v. *Gulfport Shipbuilding Corporation*, 221 F. 2d 621 (C.A. 5). There, the CAROL ANN, a partly scrapped shrimp boat that could still be towed, was held to be a vessel under 1 U.S.C. 3 for the purpose of asserting a maritime lien against it,[6] the court saying (at 623):

> "The 'Carol Ann' was an artificial contrivance capable of being used as a means of water transportation. It was afloat. * * * It had a deck; it

[6] It has long been clear, as recognized by the court below and its predecessor court (see *Hitner Sons Co.* v. *United States*, 13 Ct. Cust. App. 216, 219, T.D. 41175) that in determining what is a vessel, admiralty cases are regarded as pertinent and persuasive in customs cases.

> had cabins, it had superstructure. It had no motive power of its own; no steering mechanism, but it definitely was capable of being used as a means of transportation under tow."

It was their *use or capability of use as means of water transportation* that made the dredge and scows in *The International,* and the CAROL ANN in *Pleason,* vessels; intention had nothing to do with it.

Many cases, in addition to the foregoing, teach that maritime craft with fewer navigational characteristics than petitioners' midbodies are nevertheless vessels. In *Senko* v. *Lacrosse Dredging Corp.,* 352 U.S. 370, a case under the Jones Act (Act of June 5, 1920, c. 250, § 33, 41 Stat. 1007, 46 U.S.C. 688), the benefits of which have been restricted to "members of a crew of a vessel" (see *Swanson* v. *Marra Bros.,* 328 U.S. 1), while the question was not raised as to whether a dredge was a vessel, the Court in its opinion, and the dissenting Justices as well, assumed it to be such. See 352 U.S. at 371, fn. 1, and at 375, fn. 1. Moreover, in *Gianfala* v. *Texas Co.,* 350 U.S. 879, a case that involved an oil drilling barge, this Court cited as the basis of its *per curiam* opinion decisions of the courts of appeals for the first, fourth, and sixth circuits in which those courts had held that a floating derrick engaged in pouring concrete for the building of a bridge and non-self-propelled dredges and barges were vessels. See also *Marine Drilling Company* v. *Autin,* 363 F. 2d 579 (C.A. 5); *Producers Drilling Company* v. *Gray,* 361 F. 2d 432 (C.A. 5).[7]

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[7] It is anomalous that the court below held that petitioners' midbodies were not vessels, although it is clear that had one of the seamen who sailed petitioners' midbodies to this country suffered an injury, Jones Act relief would have been available to him as a member of a crew of a vessel.

In *United States* v. *Tug Parris Island,* 215 F. Supp. 144 (E.D.N.C.), the only reported case involving the question whether, specifically, a midbody is a vessel, the United States brought an action in admiralty against a T-2 tanker midbody for damage it had inflicted while under tow in collision with the Coast Guard cutter CHILULA. The Court, while holding the midbody not liable because it was under the exclusive control of its tug, found that there was no dispute that the tanker midbody was a vessel. 215 F. Supp. at 148. Indeed, the Government itself, both in bringing the action and in opposing a motion to dismiss the libel *in rem* against the midbody, considered, treated, and referred to the midbody as a vessel.

The decision below cannot be squared with any of the foregoing cases,[8] or with the many other cases cited in the opinion of the Customs Court (App. A, *infra,* pp. 6a-11a; R. 118-124; 238 F. Supp. at 486-88). As watercraft used and capable of being used as means of water transportation, the midbodies were, at the time of their arrival in the United States, vessels in every sense of the definition provided by the Congress in 1 U.S.C. 3 as it has been judicially applied.

2. As vessels, the midbodies were not subject to duty. The duty-free status of vessels, at the time the midbodies were brought to the United States, rested not upon specific statutory provisions, but upon the decision in *The Conqueror,* 166 U.S. 110. As this Court there said, the Congress had recognized from 1789 onward "that vessels should be treated as a class by them-

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[8] The decision below also cannot be squared with earlier decisions of the court below and its predecessor court (*Thornley & Pitt* v. *United States,* 18 C.C.P.A. (Customs) 265, T.D. 44428; *Hitner Sons Co.* v. *United States,* 13 Ct. Cust. App. 216, T.D. 41175).

selves, and not within the general scope of the tariff acts." 166 U.S. at 121.

The reliance by the court below, and by the Government in that court, on *H. W. Chadbourne* v. *United States,* 27 C.C.P.A. (Customs) 85, C.A.D. 66, is misplaced. The yacht in that case was dutiable because by paragraph 370 of the Tariff Act of 1930, Act of June 17, 1930, c. 497, Par. 370, 46 Stat. 625, the Congress had subjected that species of vessels to duty, and not, as argued below (see App. B, *infra,* pp. 30a, 32a), "to encourage industries of the United States and protect American labor." If that expresses the congressional purpose in subjecting yachts to the tariff laws, it is very clear that the Congress did not feel it necessary to extend the tariff for that or any other reason to vessels generally. Nor has the Congress done so to this day. On the contrary, it is the rule of *The Conqueror* that is now codified in the Tariff Schedules of the United States. Tariff Classification Act of 1962, Act of May 24, 1962, 76 Stat. 72, 19 U.S.C. 1202. General Headnote 5 of the Tariff Schedules, 19 U.S.C. 1202, paragraph 5, specifically excludes from the "articles subject to the provisions of these schedules" "(e) vessels which are not 'yachts or pleasure boats' within the purview of subpart D, part 6, of schedule 6." Thus *Chadbourne,* as the result of congressional enactment pertaining to yachts, exemplifies the exception to the rule of *The Conqueror* that vessels are not subject to customs duties.

The ancient distinction, expounded in *The Conqueror,* between goods, wares, and merchandise, which are subject to duty, and vessels, which are not, remains valid to this day. The argument below regarding encouraging American industry and protecting American labor is one properly addressed to the Con-

gress. Until the Congress speaks and subjects vessels or particular species of vessels to customs duties, as it did with respect to yachts, the rule of *The Conqueror,* now embodied in the Tariff Schedules, stands as the law. The decision below cannot stand along side it, and must therefore be reversed.

3. The question presented is vitally important to the shipping industry. Its determination will do more than resolve the tariff status of petitioners' two midbodies here in controversy, involving customs duties of $453,142. Petitioners' counsel also represent the owners of 20 other midbodies who have cases pending before the various Collectors of Customs, involving customs duties of $4,537,694,[9] and as to these also this

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[9]

Owner	Port of Entry	Duty Paid
Sea-Land Ships, Inc.	Baltimore	$333,184.76
Sea-Land Ships, Inc.	New York	303,930.65
Sea-Land Ships, Inc.	New York	351,670.05
Sea-Land Ships, Inc.	New York	303,930.65
Paco Tankers, Inc.	San Francisco	215,673.37
Paco Tankers, Inc.	San Francisco	210,843.19
Chas. Kurz & Co., Inc.	San Francisco	189,956.68
Keystone Shipping Co.	San Francisco	198,393.82
American Shipbuilding Co.	Cleveland	227,649.64
American Shipbuilding Co.	Cleveland	230,916.14
Bethlehem Steel Co.	Baltimore	105,485.34
Bethlehem Steel Co.	Boston	114,329.71
Maryland Shipbuilding & Drydock Co.	Baltimore	204,368.75
Maryland Shipbuilding & Drydock Co.	Baltimore	213,106.28
Maryland Shipbuilding & Drydock Co.	Baltimore	204,231.57
Maryland Shipbuilding & Drydock Co.	Baltimore	223,018.20
Maryland Shipbuilding & Drydock Co.	Baltimore	214,768.59
Maryland Shipbuilding & Drydock Co.	Baltimore	213,196.53
Todd Shipyards Corporation	New York	236,183.36
Todd Shipyards Corporation	New York	242,856.73

litigation will be dispositive on the issue here presented. In addition, counsel for petitioners know of six other pending cases where the "vessel" issue has similarly been raised. It is estimated that the customs duties involved in all these cases exceed six million dollars. It is important that the principle that will govern the determination of these many pending cases on the issue here presented be consistent with 1 U.S.C. 3 and with the decisions of this Court and of the United States Courts of Appeals, discussed *supra*, construing and applying that statute.

American shipowners have, moreover, a continuing interest in bringing foreign-built midbodies to the United States for subsequent incorporation into rebuilt merchant ships. While such rebuilt ships may no longer engage in the coastwise trade (Act of July 5, 1960, 74 Stat. 321, § 1, 46 U.S.C. 883), there are other avenues of profitable merchant shipping open to them. The question presented, therefore, not only has an immediate impact on the American shipping industry, that can be measured in terms of not inconsiderable amounts of money, but also a substantial impact on the economic health and welfare of that industry in the foreseeable future.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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